No. 50059-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re Marriage of

ROXANNE SHORTWAY

Appellant/Petitioner.

and

WILLIAM SHORTWAY,

Respondent/Respondent

APPEAL FROM THE SUPERIOR COURT OF WASHINGTON IN AND FOR
THE COUNTY OF KITSAP
(The Honorable Sally F. Olsen

RESPONDENT'S BRIEF

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I. INTRODUCTION

The appellant appeals a decision of the Kitsap County Superior Court that was financially averse to her. The appellant and respondent were divorced on July 26, 2012. Upon granting the divorce the Kitsap County Superior Court entered a Final Order for Support. The order set forth the respondent's obligation to pay a monthly transfer payment of $400 per month and 71 percent of child care costs incurred by the appellant. In 2015 the appellant requested the Department of Social and Health Services, specifically the Office Support Enforcement, initiate an administrative action to enforce the prior Order for Support by collecting an arrearage that the administrative tribunal found under the order. On April 29, 2016, the appellant file a Summons for Petition for Modification of Child Support and a Petition for Modification of Child Support requesting the Kitsap County Superior Court modify child support and enter a judgment for any unpaid child support or child care expenses paid by the appellant but not reimbursed by the respondent. The appellant concurrently litigated both matters until the administrative tribunal issued a Final Order establishing a judgment in the appellants favor against the respondent in the amount of $3,084.86 for a period between March 1, 2016 and September 30, 2016.

The respondent filed a Motion with the Kitsap County Superior Court to establish a judgment in the respondent's favor for an overpayment

of child care expenses. After reviewing the record, and hearing oral argument of counsel the Kitsap County Superior Court entered a judgment in amount of $329.86 in the favor of the respondent and against the appellant. This order was entered February 3, 2017. The appellant now appeals the February 3, 2017 order.

II. STATEMENT OF THE CASE

The Kitsap County Superior Court entered a Final Child Support Order on July 26, 2012. CP 12. The order mandated that the respondent pay $400 per month for the support of the parties child, and that the respondent was to pay 71 percent of all child care costs incurred by the appellant. CP 12. Nowhere in the appellant's brief does the appellant indicate that she receives a subsidy from the Canadian government for child care. CP 12 (receipt of government subsidy.) The Final Child Support Order was to remain effective until the child turned eighteen (18) years of age, or was no longer enrolled in high school which ever occurred last. The court reserved its ruling on post-secondary educational support.

The appellant initiated a quasi-judicial action for the enforcement of the July 26, 2012 Final Child Support Orders through the Department of Social and Health Services, specifically the Office of Support Enforcement. CP 12 and 562. The appellant sought to reduce the Respondent's 71 percent of child care costs incurred by the appellant to a fixed dollar amount, and to

determine whether or not an arrearage for unpaid child care existed. CP 12 and 562.

On April 28, 2016, the appellant filed a Summons for Modification of Child Support and a Petition for Modification of Child Support with the Kitsap County Superior Court. CP 406-415. Through her Petition for Modification of Child Support the appellant specifically requested that the Kitsap County Superior Court determine if any arrears for unpaid child support or unpaid child care existed, and to clarify the inclusion of any special expenses for the child at issue. CP 410. The appellant prepared and included a calculation of the estimate arrears ($5,221.99) for unpaid child support and child care. CP 413. The appellant's action of initiating the superior court matter had the practical effect of initiating concurrent litigation regarding the same subject matter, the respondent's responsibility for child care expenses, and whether an arrearage for unpaid child care expenses existed.

III. ARGUMENT

The Court of Appeals reviews modifications of child support for abuse of discretion where the challenging party must demonstrate that the trial court's decision is manifestly unreasonable, based on untenable

grounds, or granted for untenable reasons.[1] While the case at bar does not directly appeal a modification of child support as the appellant's Petition for Modification of Child Support has not been reduced to final order and is still pending the case at bar considers the effect of the Kitsap County Superior Court's ruling on day care arrearages, and whether or not the appellant would be responsible for a fixed dollar amount of child care costs, or a percentage of the cost. Division 1 of the Washington State Court of Appeals has held that provisions of a child support order dealing with issues other than the direct transfer order, are a review of the child support order.[2] The case at bar reviews the provision of the child support order applicable to payments of expenses not included in the transfer payment, applying the *Peterson* Court's holding to the case at bar, the case at bar should be held to be a review of a child support order.

1. **ASSIGNMENT OF ERROR A**: WHEN A PROPER APPEAL OF AN ADMINISTRATIVE ORDER WAS NOT [sic] TAKEN, THE SUPERIOR COURT ERRED IN GRANTING RESPONDENT'S MOTION REGARDING DAYCARE ARREARAGE AND ADMINISTRATIVE RULING WHICH CHANGED THE ADMINISTRATIVE RULING.

   BRIEF ANSWER: THE SUPERIOR COURT DID NOT ERROR IN GRANTING THE RESPONDENT'S MOTION WHEN THE APPELLANT ENGAGED IN INITIATING AND LITIGATING COLLATERAL CASES BEFORE DIFFERENT TRIBUNALS REGARDING SUBSTANTIALLY SIMILAR CLAIMS AS RES

[1] *Schumacher v. Watson*, 100 Wash.App. 208, 211 (Wash. Ct. App. Div. 1, 2000) *citing In re Marriage of Peterson*, 80 Wash.App. 148, 152 (Wash. Ct. App. Div 1, 1995).
[2] *In re Peterson*, 80 Wn.App. 148, 156, 906 P. 2d 1009 (1995).

JUDICATA DOES NOT APPLY SINCE THE ACTIONS OF THE APPELLANT OFFEND THE UNDERLYING PRINCIPLES OF RES JUDICATA AND THE CASE LAW CITED BY THE APPELLANT DOES GOVERN THIS CASE AS IT IS DISTINGUISHABLE ON THE FACTS.

Res judicata is not a precise term and has been used to describe both claim preclusion and issue preclusion saying that res judicata refers to the preclusive effect of judgments, including the re-litigation of claims and issues that were litigated or might have been litigated in a prior action.[3] When res judicata is used to mean claim preclusion it encompasses the idea that parties to two successive actions are the same, and the prior action resulted in the issue of a final judgment a matter may not be re-litigated if it could have been raised in the prior action.[4]

Res judicata is designed to prevent re-litigation of already determined causes and to curtail multiplicity of actions and harassment through the courts.[5] Res judicata does not bar claims arising out of different causes of action, or intend "to deny the litigant his or her day in court."[6]

The court has also stated many times that res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but

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[3] *Kelly-Hansen v. Kelly-Hansen*, 87 Wash.App. 320, 328 (Wash. Ct. App. Div. 2, 1997).
[4] . Id at 328-329
[5] *Loveridge v. Fred Meyer, Inc.*, 125 Wash.2d 759, 763 (1995).
[6] *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wash.2d 853, 865 (2004) *citing Schoeman v. N.Y. Life Ins. Co.*, 106 Wash.2d 855, 859, 726 P.2d 1 (1986).

to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[7] This rule has been adhered to and followed in this state.[8]

This court has held that re judicata applies to quasi-judicial decisions of an administrative tribunal as well as to the judicial decision of a court.[9] The *Aldrich* Court was asked to determine whether a litigant can collaterally attack a decision of an administrative court by filing a motion with a superior court; the *Aldrich* Court held that an administrative court's decision is entitled to res judicata and may not be collaterally attacked.[10] In *Aldrich*, the parties' dissolution was finalized on November 1978, the court split custody of the parties two children awarding custody of one child (Jolene) to the mother, and custody of the other child (Jason) to the father.[11] In May of 1989, Jason moved from his father's primary care to the primary care of his mother.[12] In July of 1989, the Department of Social and Health Services

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[7] *Kelly-Hansen*, 87 Wash.App at 329.
[8] *See generally Achey v. Creech*, 21 Wash. 319, 58 P. 208; *Loeper v. Loeper*, 81 Wash. 454, 142 P. 1138; *Woodland v. First National Bank*, 124 Wash. 360, 214 P. 630; *Sprague v. Adams*, 139 Wash. 510, 247 P. 960, 47 A.L.R. 529; *Munro v. Irwin*, 163 Wash. 452, 1 P.2d 329; *Cascade Lumber Co. v. Hargis*, 167 Wash. 409, 9 P.2d 366; *Globe Construction Co. v. Yost*, 173 Wash. 528, 23 P.2d 895.
[9] *In re Marriage of Aldrich*, 72 Wash.App. 132, 138 (Wash. Ct. App. Div. 2, 1993).
[10] *See generally In re Marriage of Aldrich*, 72 Wash.App 132.
[11] *Id* at 134.
[12] *Id.*

commenced administrative child support proceedings against the father.[13] The administrative proceeding ordered the father to pay $626 per month in child support; the father appealed but his appeal was not perfected in a timely manner, due to untimely service, and was dismissed.[14]

The father moved for an Order to Show Cause, on October 18, 1990, under the original dissolution case. The father asked the court to set arrearages under the 1979 order, and to prohibit DSHS from collecting amounts in excess of the 1979 order.[15] The Superior Court denied the father's motion and held that DSHS had erred in setting child support administratively, and that the father had lost his right to enforce the 1979 order when he failed to timely serve his administrative appeal, and that DSHS was entitled to collect support under the administrative order.[16]

The father appealed the Superior Court's ruling that asserting that the DSHS has entitled to initiate a proceeding as there was a Superior Court order in place at the time DSHS commenced its action.[17] The *Aldrich* Court held that the DSHS was entitled to commence the action as the applicable statutes RCW 74.20.220, RCW 74.20.330, RCW 74.20A.030, RCW 74.20A.040, RCW 74.20A.055 when read together govern the amount

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[13] *Id.*
[14] *Id* at 135.
[15] *Aldrich*, 72 Wash.App. at 135.
[16] *Id* at 135.
[17] *Id.*

DSHS may collect, but do not deprive DSHS of the ability to act.[18] In addressing the father's collateral attack on a quasi-judicial order of an administrative tribunal the *Aldrich* Court held that the quasi-judicial order of the administrative tribunal was entitled to the protections of res judicata. The *Aldrich* Court held res judicata applies to quasi-judicial rulings of an administrative court and that a litigant may not collaterally attach a quasi-judicial ruling by filing a motion in a different action before a different tribunal.[19]

Res judicata precludes parties from initiating successive actions that are the same and the prior action resulted in the issue of a final judgement.[20] The court has also stated many times that res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion on and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[21] All cases following this rule contemplate successive actions, where a litigant initiated a subsequent action after a prior action had resulted in the issue of a final order. No cases found by the respondent, contemplate the

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[18] *Id* at 137.
[19] *Id* at 138.
[20] *Kelly-Hansen*, 87 Wash.App. at 328-329
[21] *Id* at 329.

impact of the same litigant initiating concurrent actions before two different tribunals prior to the issuance of a final order from the first tribunal.

The case at bar is one of these special cases where the prior order, in this case a quasi-judicial order, should not receive the protection of res judicata due to the appellant's initiation of multiple collateral litigations regarding the same matter, the arrearage of unpaid child support and/or child care, before different tribunals. Res judicata, when used to refer to claim preclusion, encompasses the idea that parties to *two successive actions*, may not relitigate the same issue if the *prior action* resulted in a judgment.[22] Res judicata is also designed to prevent re-litigation of already determined causes and to curtail multiplicity of actions and harassment through the courts.[23]

The *Kelly-Hansen* Court's decision restricts res judicata to situations where a litigation is concluded by issue of a final order, and then a litigant initiates a subsequent action regarding the same subject matter that was, or should have been at issue in the prior action. In the case at bar, the petitioner initiated a quasi-judicial action for the enforcement of the existing Order for Support in 2015. CP 562. On April 8, 2016, the petitioner filed a Summons for Modification of Child Support and Petition for Modification of Child

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[22] *Kelly-Hansen*, 87 Wash.App. at 328-329 (emphasis added).
[23] *Loveridge v. Fred Meyer, Inc.*, 125 Wash. At 763.

Support with the Kitsap County Superior Court. CP 406-415. The petitioner specifically asked the Kitsap County Court to determine if any arrears for unpaid child support existed and to clarify the inclusion of any special expenses that are particular to this child. CP 410-411. The petitioner calculated, and attached, an estimation of arrears owed to the petitioner by the respondent, specifically requesting $5,221.99 for arrears of "Child Support/Child Care". CP 413.

The appellants action of starting concurrent litigations regarding the same issue effectively created a race to issue a final order between the administrative court and the Kitsap County Superior Court, whereby the first final order issued by a tribunal would, under the general rule of res judicata, be entitled to the preclusive effects of res judicata on the other concurrent action and any subsequent order issued by the tribunal to issue their final order second.

The *Kelly-Hansen* Court's basic definition of res judicata, when used to describe claim preclusion, does not apply to the case at bar as there was not successive actions regarding the same issue, but rather concurrent actions regarding the same issue at the time the administrative court issued its final order. Given the concurrent actions initiated by the appellant, the principal of res judicata should not apply to the final order of the administrative court the Kitsap County Superior Court was not precluded

by res judicata from addressing the whether an arrears of unpaid child support or child care costs existed and if so the amount. As the administrative court's decision should not receive the protection of res judicata, the Kitsap County Superior Court's assertion of jurisdiction by rendering an order on the arrearage of unpaid child care costs was proper and the appellant did not need to appeal the administrative decision to provide the Kitsap County Superior jurisdiction to determine the matter as the appellants Petition to Modify Support provided the court the jurisdiction to determine the issue presented.

By filing her Petition to Modify Child Support on April 28, 2016 and specifically requesting the Kitsap County Superior Court enter a judgment in her favor the amount of an unpaid child support or child care costs, subsequent to the appellants initiation of the administrative proceeding to reduce the respondent's percentage of child care costs to a fixed dollar amount and determine if any arrearage existed for unpaid child care costs, the appellant created a multiplicity of litigations regarding the same subject matter. CP 406-416. The multiplicity of actions regarding the same issue initiated by the appellant violates the purpose of res judicata as stated the Washington Supreme Court in Loveridge v. Fred Meyeer, Inc., supra. The appellant's violation of the prohibition on multiple actions regarding the same subject matter should prevent the principal of res

judicata from applying to the administrative court's final order. Without res judicata applying to the administrative order, the Kitsap County Superior Court was free to rule on the issue of any arrearage as the appellant specifically requested that the court issue such a ruling via her Petition to Modify Support.

This court should find that *Aldrich* has no precedential value to the instant case as the facts at issue in *Aldrich* are distinguishable from the facts of the case at bar. The *Aldrich* court held that res judicata applied to a prior quasi-judicial decision of an administrative court, thereby preventing a litigant from raising the same issues before the superior court via a collateral attack on the quasi-judicial order.[24] In *Aldrich*, the father's appeal of the quasi-judicial decision of the administrative court, was dismissed for want of timely service, the father then filed an Order to Show Cause enforcing the terms of the original 1979 Order for Support and preventing DSHS from enforcing their judgment.[25] The *Aldrich* Court makes no mention of either party petitioning the Superior Court to modify the existing child support order during the litigation of the administrative court's action, and that the final order from the administrative court was issued prior to any party

[24] *See generally Aldrich*, 72 Wash.App. at 138.
[25] *Id* at 135.

requesting substantially similar relief from a Superior Court with competent jurisdiction.[26]

The facts of *Aldrich* as recited by the court indicates that there was only one action, the administrative action, pending at the time the final order was issued by the administrative court. In the case at bar, at the time that the administrative court issued its final order, there were two actions pending regarding the same subject matter, furthermore, both actions were initiated by the appellant. At the time of the administrative tribunals final order the appellant had initiated and concurrently litigated two separate and distinct actions, before two separate and distinct tribunals, but with a commonality of subject matter, child care payments and if an arrearage for unpaid child care costs existed. The appellant initiated the administrative action in 2015 requesting the administrative tribunal determine whether an arrearage of child care expenses existed and asking to reduce a monthly child care costs to a fixed dollar amount. CP 2 and 562. On April 28, 2016, the respondent filed a Petition for Modification of Child Support in the Kitsap County Superior Court and specifically asked the superior court to establish an arrearage for unpaid child care costs and unpaid child support. CP 410.

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[26] *See generally Aldrich*, 72 Wash.App. 132.

The appellants act of requesting affirmative relief from the Kitsap County Superior Court regarding the issue of an arrearage of unpaid child support and child care costs subsequently to her initiation of the administrative proceeding created multiple litigations (the administrative action, and the Superior Court action) regarding the same issue, the arrearage of child care expenses. The concurrent actions create a substantial factual difference between the case at bar, and the facts as presented in *Aldrich*. The multiplicity of actions initiated by the appellant are the critical difference between the case at bar and *Aldrich* and deprive the *Aldrich* Court's holding from having precedential value to the case as the *Aldrich* Court did not consider concurrent actions regarding the same issues, but rather only examined a litigant's collateral attack through a subsequent action when the actions were consecutive in time, rather than concurrent. The appellant's act of initiating multiple actions regarding the same subject matter prior to the issuance of the final order, and the factual differences between the facts of *Aldrich* and the facts of the case at bar should lead the court to find that Aldrich has no precedential value to the case at bar, and thus this Court should find that res judicata does not apply to the case at bar and that the court's prior decision in *Aldrich* is not binding authority in in this matter.

Initiating multiple actions regarding the same subject matter is repugnant to the purpose of res judicata and offends its goal of preventing a multiplicity of actions regarding the same subject matter. In the case at bar the petitioner initiated concurrent actions regarding the same subject matter by filing her Petition for Modification of Child Support prior to the administrative tribunal issued its final order. The petitioner's initiation of multiple actions should prevent the doctrine of res judicata from applying to the quasi-judicial order as there were not successive litigations regarding the same subject matter with the prior litigation resulting in a final order but rather there were to concurrent litigations regarding the same subject matter. The initiation of concurrent litigations should deprive this Court's decision in *Aldrich* of precedential value as the current matter is factually distinguishable from *Aldrich.*

The *Aldrich* Court was faced asked to determine if a litigant can collaterally attack a prior final order issued by an administrative court by subsequently filing an Order to Show Cause in a different matter before a different court. In the case at bar, this court is asked to determine if a litigant can collaterally attack a final order when the same litigant placed the issue before two different tribunals concurrently by creating a multiplicity of actions. In *Aldrich*, only one action existed, the DSHS action for the payment of child support from the father to the mother, at the time that the

administrative court issued its final order.[27] In the case at bar, two separate and distinct actions regarding the same issue existed at the time of the administrative court's final order. Both of the collateral litigations were initiated by the petitioner with requests to determine if any arrearage for unpaid child support or unpaid child care costs existed. This factual differences between the facts in *Aldrich* and the case at bar, should deprive the holding of *Aldrich* of its precedential value. Therefore, this court should hold that the assertion of jurisdiction by the Kitsap County Superior Court under the father's motion was proper, and not barred by this Court's prior decision in *Aldrich*.

2. **ASSIGNMENT OF ERROR B**: EVEN IF THE SUPERIOR COURT HAS GENERAL AUTHORITY TO CONSIDER THE MATTER WHERE THERE WAS NO PROPER APPEAL, THE SUPERIOR COURT ERRONEOUSLY INVALIDATED THE ADMINISTRATIVE LAW JUDGE'S DECISION FOR POST-FEBRUARY, 2016 DAY CARE EXPENSES BY FINDING THAT THE SUPERIOR COURT WAS NOT "SILENT" ON THE TIME FRAME RULED ON EVEN THROUGH THE PRIOR ORDER OF THE SUPERIOR COURT JUDGE WAS "AS OF FEBRUARY 28, 2016" AND DID NOT SPECIFY ANY OTHER TIME PERIOD.

   BRIEF ANSWER: THE SUPERIOR COURT CORRECTLY INVALIDATED THE ADMINISTRATIVE RULING AS THE ADMINISTRATIVE TRIBUNAL'S DECISION WAS NOT ENTITLED TO THE PROTECTION OF RES JUDICATA, THE CASE OF *DEPARTMENT OF SOCIAL AND HEALTH SERVICES V. HANDY* DOES NOT GOVERN THE CASE AT BAR AS THE APPELLANT CONDUCTION OF CONCURRENT LITIGATION AS THE FACTS OF *HANDY* ARE DISTINGUISHABLE FROM THE

[27] *See generally Aldrich*, 72 Wash.App. 132.

CASE AT BAR AND THE KITSAP COUNTY SUPERIOR COURT ENTERED AN ORDER FOR SUPPORT ON JULY 26, 2012 THAT WAS NOT SILENT ON THE ISSUE OF THE RESPONDENT'S RESPONSIBILITY FOR CHILD CARE COSTS INCURRED BY THE APPELLANT.

The Court of Appeals of Washington has previously held:

> "that where a superior court orders does not deal with the same time period that is addressed in the administrative proceeding, that the superior court order is "silent" resulting in an "absence of a superior court order as OSE is authorized to proceed"[28]

In *Handy*, the mother requested the Department of Social and Health Services initiate non-assistance support enforcement pursuant to the statutory authority pursuant to RCW 74.20.040(2) on March 9, 1987.[29] On October 7, 1987, the mother filed a Petition for Dissolution in the Superior Court for the State of Washington.[30] The superior court ordered that the father pay $340 per month plus one-half of actual daycare expenses commending on the date of the hearing, December 11, 1987. On December 30, 1987, an Administrative Law Judge entered a continuing order for support ordering the father to pay $434 per month commencing March 1987 for the support of his children. On September 11, 1990, the superior court entered an order invalidating the administrative support obligation. The

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[28] *Department of Social and Health Services v. Handy*, 62 Wash.App. 105, 110 (1991).
[29] *Id* at 107.
[30] *Id.*

Department of Social and Health Services appealed the superior court's order.

The Court of Appeals held that RCW 74.20A.055(1) specifically provides that it is the absence of a superior court order and not the absence of a dissolution filing that authorizes OSE to proceed to establish a support obligation."[31] The *Handy* court reasoned that where a superior court order is silent as to support, OSE may proceed administratively to establish support obligations.[32] The court further clarified that it would "seriously frustrate the purposes of the statute" to allow a routine temporary support order in a dissolution proceeding to foreclose the Office of Support Enforcement from establishing or collecting a support obligation for the period prior to the effective date of the superior court's temporary support order. Id.

In the case at bar, the appellant appears to argue that there was no support order in place covering the same time period contemplated by the administrative court's order. In support of this argument the respondent cites to *Handy* quoting:

> 'where a superior court order does not deal with the same time period that is addressed in the administrative proceeding, that the superior court order is "silent" resulting in an "absence" of a superior court order."[33]

[31] *Id* at 108.
[32] *Id* at 110.
[33] *Id*

The appellant's argument, and reliance on *Handy* is misplaced as for all time periods addressed by the administrative court a Superior Court order was in place and effective. The Kitsap County Superior Court previously entered an Order for Support (Final Order) on July 26, 2012; well prior to time period of at issue. CP 406-415. The fact that there was a Superior Court order in place renders the case at bar factually distinguishable from *Handy*. In *Handy*, the administrative order of support mandated the father's payment of $434 per month commencing in March of 1987.[34] The Superior Court's order was effective December 11, 1987, the date of the show cause hearing.[35] Therefore, between March 1987 and December 11, 1987, there was no superior court order in place, as the court had not addressed the issue of child support until December 11, 1987.

In the case at bar, the Kitsap County Superior Court entered an Order for Support (Final Order) on July 26, 2012 setting forth the father's monthly transfer payment ($400) and the father's percentage responsibility of daycare (71 percent). CP 12. This order was to be in effect until, either the child turns eighteen (18) years of age, or until the child is no longer enrolled in high school, whichever occurs last, unless child post-secondary support is ordered in under paragraph 3.14 of the child support order. Therefore,

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[34] *Id* at 107.
[35] *Id.*

after July 26, 2012 there was never any date where there was not a child support order in place addressing the payment of day care expenses.

The appellant argues that the court's order on arrearages of February 3, 2017 is not prospective and cannot be prospective. The respondent agrees that the order entered by the Kitsap County Superior Court on February 3, 2017 was not prospective, but rather was a retrospective order setting forth the overpayment of the respondent. However, the appellant fails to recognize that the Kitsap County Superior Court's Order for Support entered on July 26, 2012 is the prospective order in place for all time periods after it was entered.

The Order for Support is the final order that addressed the respondent's payment of child support, for all time periods addressed by the administrative law judge, rather than the Kitsap County Superior Court's order of February 3, 2017. Furthermore, the Appellant's Petition for Modification of Child Support specifically places any arrearage of child support at issue before the Kitsap County Superior Court, therefore the superior court has proper authority to render a decision for any time period prior to the Petition for Modification of Child Support filed by the appellant on April 28, 2016. CP 406-415. As the Kitsap County Superior Court had jurisdiction over whether or not an arrearage for unpaid child support or

daycare expenses existed, the court properly ruled on a motion regarding an issue placed before the court by the appellant. CP 406-415

3. **ASSIGNMENT OF ERROR C**: THE SUPERIOR COURT ERRONEOUSLY INVALIDATED THE ADMINISTRATIVE LAW JUDGE'S DECISION TO ESTABLISH A FIXED DOLLAR AMOUNT OF THE CURRENT AND FUTURE SUPPORT OBLIGATION" PURSUANT TO RCW 26.23.110

   BRIEF ANSWER: THE SUPERIOR COURT CORRECTLY INVALIDATED THE ADMINISTRATIVE TRIBUNALS ORDER REDUCING THE RESPONDENT'S FUTURE CHILD SUPPORT OBLIGATION FOR CHILD CARE COSTS TO A FIXED DOLLAR AMOUNT AS THE APPELLANT DID NOT ARGUE RCW 26.23.110 BEFORE THE SUPERIOR COURT AND HAS THEREFORE WAIVED THE ABILITY TO APPEAL THIS RULING, THE APPELLANT INITIATED CONCURRENT LITIGATION BEFORE TWO DIFFERENT TRIBUNALS AND THE ADMINISTRATIVE TRIBUNAL INCORRECTLY REDUCED THE RESPONDENT'S PROPORTIONAL RESPONSIBILITY FOR CHILD CARE COSTS BY VIOLATING A PRIOR ORDER OF THE SUPERIOR COURT.

It is well settled law that an error of the trial court may not be raised for the first time on appeal.[36] An appellate court generally declines to review any claim of error that was not raised in the trial court.[37]

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[36] *See generally Collins v. Fidelity Trust Co.*, (1903) 33 Wash. 136, 73 P. 1121 (1903) *see also Miller v. Staton* 58 Wash.2d 879, 365 P.2d 333 (1961) (Objection based on theory not presented to trial court cannot be raised for first time on appeal); *Lawson v. Helmich*, 20 Wash.2d 167, 146 P.2d 537 (1944) (Question which was not presented to or considered by trial court, will not be considered on appeal);.*River House Development Inc. v. Integrus Architecture, P.S.*, 167 Wash.App. 221, 272 P.3d 289 (2012) (Generally, appellate courts will not entertain issues raised for the first time on appeal); *Wilson & Son Ranch, LLC v. Hintz*, 162 Wash.App. 297, 253 P.3d 470 (2011) (Generally, appellate courts will not entertain issues raised for the first time on appeal; reason for this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials).

[37] RAP 2.5(a); *Mellish v. Frog Mountain Pet Care*, 172 Wash.2d 208, 221-222, 257 P.3d 641 (2011).

An appellate court may review three specific issues for the first time on appeal; 1) lack of trial court jurisdiction, 2) failure to establish facts upon which relief may be granted, and 3) manifest error affecting a constitutional rights.[38] The appellant has not argued any of the foregoing three exceptions to raising an issue for the first time on appeal. As such the appellant requests that this court refuse to review Assignment of Error No. 4. As offered by the appellant. Evidence of the appellant's failure to raise this issue before the superior court is the order that is currently before the court, furthermore, the February 3, 2017 order entered by the Kitsap County Superior Court. The order, as entered, makes no mention of RCW 26.23.110 but rather cites specifically to RCW 74.20A.55, RCW 74.20A.59, and RCW 34.12. CP 622-627 and *see generally* Verbatim Transcript of Proceedings for January 13, 2017. As the February 3, 2017 order makes no mention of RCW 26.23.110, it is clear that the appellant did not raise this issue before the superior court, and therefore may not be raised for the first time on appeal as the issue does not concern a lack of trial court jurisdiction, a failure to establish facts upon which relief may be granted, or a manifest error affecting a constitutional right. CP 622-627. While a child has a fundamental right to support, no cases found by respondent extend the child

[38] RAP 2.5(a)(1)-(3).

fundamental right to support to a parent's right to receive reimbursement for child care expenses.

If this court does accept and review Assignment of Error No. 4 as proffered by the appellant, the respondent argues the following in the alternative. The appellant relies on RCW 26.23.110 arguing that the administrative law judge had authority to reduce prior daycare to a fixed dollar amount. In general, the respondent does not dispute the interpretation of RCW 26.23.110 advanced by the appellant, as the plain language of RCW 26.23.110 provides the administrative tribunal the authority to reduce an order of support to a fixed dollar amount rather than a percentage of the cost. RCW 26.23.110 does provide an administrative tribunal the authority to reduce a percentage of daycare, or other expenses not included in a transfer payment to a fixed dollar amount.

However, the appellant's reliance on RCW 26.23.110 is misplaced as the filed her Petition for Modification of Child Support. RCW 26.23.110(10) states:

> If either parent does not initiate an action in superior court, and serve notice of the action on the department and the other party to the support order within the twenty-day period, the parent shall be deemed to have mad an election of remedies and shall be required to exhaust administrative remedies under this chapter with judicial review available as provided for in RCW 34.05.510 through 34.05.598.

In the case at bar, the respondent selected his remedy of an administrative hearing by not initiating a superior court action within twenty days from receiving the notice of the administrative action, as he is required to do by RCW 26.23.1101(10). However, the appellant willfully and intentionally placed the issue of any arrearage for unpaid child support or day care before the Superior Court of Kitsap County by filing her Petition for Modification of Child Support on April 28, 2016 and specifically asking the Superior Court of Kitsap County to rule on the issue of an arrearage of child care costs. CP 406-415. By willfully and intentionally placing the issue of the existence of an arrearage for unpaid child support or child care before the Kitsap County Superior Court for determination, the appellant granted the Kitsap County Superior Court jurisdiction to determine whether an arrearage existed, and if so, the amount of the arrearage. The superior court ruled in the issue placed before it by the appellant, to the detriment of the appellant, and the appellant now appeals the superior court's decision claiming the benefit of the administrative hearing due to the adverse ruling of the superior court. I tis improper for the appellant to appeal an issue that she intentionally placed before the court as the appellant invited the court's error by placing the same issue before two separate tribunals, conducting concurrent litigation regarding the same issue.

Furthermore, the administrative tribunal incorrectly reduced the Kitsap County Superior Court's order to a fixed dollar amount. The Order of February 3 mandated that the child care expenses be converted from Canadian dollars to United States dollars on the date the child care cost was incurred or payment was made. CP 485-486. The administrative tribunal reduced the anticipated monthly expense to an annual figure, then converted this figure from Canadian dollars, to United States dollars on the date the order was written. CP 565. By converting the cost of child care on the date the order was drafted the administrative tribunal impermissibly modified the Kitsap County Superior Court order.

4. **ASSIGNMENT OF ERROR D**: THE SUPERIOR COURT ERRONEOUSLY IGNORED THE AUTHORITY OF RCW 26.23.110 AS CITED BY THE ADMINISTRATIVE LAW JUDGE

   BRIEF ANSWER: THE SUPERIOR COURT DID NOT ERRONEOUSLY IGNORE RCW 26.23.110 WHEN THE APPELLANT DID NOT CITE TO THIS STATUTE DURING ANY HEARING ON THIS MATTER, AND THE ADMINISTRATIVE TRIBUNAL EXCEEDED THE SCOPE OF THE SUPERIOR COURT ORDER

As noted in Section C above, the appellant did not argue the administrative law judge's exercise of jurisdiction under RCW 26.23.110 before the Kitsap County Superior Court, thus the waived this argument for the purposes of this appeal and this Court should deny the appellant's request for review of this issue.

The appellant argues that that the decision of administrative tribunal is co-equal to a superior court. The appellant relies on *Handy*, *supra*, for this proposition. The appellant's reliance on *Handy* is misplaced as Handy states:

> [t]his is consistent with and parallel to the rule of [RCW]72.20.055 where an administrative order precedes the superior court order. We see no reason not apply the same approach where the superior court order proceeds the administrative order...We see no risk of conflict arising between a superior court order and OSE orders because the superior court would at all times retain the authority to deal specifically with the administrative obligation and thus to supersede it to the extent is deems necessary. Where an administrative establishment of a support obligation for a period prior to the commencement of the dissolution proceedings in place, the superior court in the decree of dissolution may well wish to make provisions for this obligation along with other obligations of the parties in making the final property division.[39]

The *Handy* court further stated "we hold that the ALJ's order of December 30, 1987, is valid and effective insofar as it is inconsistent with the court's order of January 9, 1988."[40] The *Handy* court's holding is that an order of a superior court shall take precedence over the order of a administrative tribunal's order to the extent the two order's conflict.

In the case at bar the administrative tribunal's order directly conflicts with the prior order of the Kitsap County Superior Court. The prior

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[39] *Handy*, 62 Wash.App. at 111 (1991).
[40] *Id.*

orders (the orders of July 26, 2012, and August 29, 2016) of the Kitsap County Superior Court order the respondent to be responsible for 71 percent of the child care cost actually incurred by the respondent. CP 12. The administrative order entered by the administrative tribunal requires the respondent to be responsible for 166.95 percent of the child care expense incurred as found by the administrative tribunal. The administrative tribunal found that the appellant incurred an expense of $3,400 Canadian dollars, and converted this amount to $4,344.32 United States dollars, and that the respondent's portion of the expense incurred was $4,344.32. CP 563. This calculation is in error as the calculation presumes that Canadian dollars are more valuable than United States dollars. Set forth below is the actual conversion rate from Canadian dollars to Unlisted States dollars as of the date the expenses were incurred for the months of March, April, May, June, and September of 2016. The conversion rates for the months of July and August 2016 are based on the first each of each month as no materials have been provided by the appellant showing the date the expense was incurred for each respective month.

Month	**Amount paid CND**	**Conversion Rate**	**Amount in USD**
March 2016	$400.00	.7398	$295.92
April 2016	$400.00	.7683	$307.32
May 2016	$400.00	.7704	$308.16
June 2016	$600.00	.7746	$464.76
July 2016	$600.00	.7644	$458.64

August 2016	$600.00	.7745	$464.70
September 2016	$400.00	.7567	$302.68
Total Expense Incurred	**$3,400.00 CND**		**$2602.18**

The calculation shows that the appellant incurred an actual child care expense of $2,602.18 per month. The respondent's proportionate share of the child care cost incurred (71 percent) is $1,846.55. The order was entered by the administrative tribunal is inconsistent with the orders of the Kitsap County Superior Court entered previously. Under the excerpts of *Handy*, set forth above, the order of the Kitsap County Superior Court would control and the respondent would be responsible for the $1,846.55. The respondent's portion takes into account months for which the appellant did not provide documentation to the Kitsap County Superior Court, for demonstrative purposes the appellant has utilized the findings of the administrative tribunal; the discrepancy between the proof provided to each tribunal accounts for the difference between amounts owed by respondent under the corrected administrative tribunal and the Kitsap County Superior Court's order of February 3, 2017.

Furthermore, the administrative tribunal's order cannot be properly reduced to a monthly figure without exceeding the scope of the Kitsap County Superior Court's order of August 29, 2016, as the August 29 order states:

> [Respondent] shall pay future daycare expenses consistent with the court order of Child Support at the rate of 71 percent. Payment will take into account the conversion from US to Canadian dollars. The exchange rate shall be determined by the day the purchase or original payment is made."

CP 485-486. The administrative tribunal's order reduces the anticipated monthly expense of child care to an annual figure, converts the annual figure to Unites States dollars from Canadian dollars on the date the order was drafted, and then amortizes this yearly figure over twelve months resulting in a monthly payment from respondent to appellant of $421.70 United States dollars. CP 565.

By converting the yearly sum of anticipated child care as of the date that the administrative order was drafted the administrative tribunal exceed the scope of the order as entered by the Kitsap County Superior Court as the administrative tribunal utilized the exchange rate as of the date of drafting rather than the applicable rate on the date of purchase or payment. CP 485-486. Given the language of the Kitsap County Superior Court's order, the monthly child care cost may not be properly reduced to a monthly figure given the fluctuations in exchange rates, and the fluctuations effect on the converted cost of the child care. As the administrative tribunal's order was inconsistent with the orders as entered by the Kitsap County Superior Court

the administrative tribunal's orders were properly reviewed by the Kitsap County Court to correct the discrepancy between the orders.

5. **ASSIGNMENT OF ERROR E**: THE SUPERIOR COURT DID NTO PROPERLY OFFSET AMOUNTS PAID[sic] BY [RESPONDENT] AGAINST AMOUNTS OWED TO [APPELLANT].

   BRIEF ANSWER: THE SUPERIOR COURT DID PROPERLY OFFSET THE AMOUNTS PAID BY RESPONDENT AGAINST AMOUNTS OWED TO APPELLANT WHEN THE APPELLANT HAS PREVIOUSLY ACKNOWLEDGE THE ADMINISTRATIVE TRIBUNAL'S ERROR IN CALCULATING THE AMOUNT OWED TO APPELLANT AND THE APPELLANT HAS CITED NO LEGAL AUTHORITY ALLOWING THIS COURT TO ENTER EQUITABLE RELIEF IN VIOLATION OF RAP 9.2(b).

The appellant believes that it is appropriate to seek this court's review of the trial court's decision by failing to provide a complete record of all relevant proceedings. The appellant failed to include a transcript of the December 9 hearing argued before the Kitsap County Superior Court, the initial hearing on the respondent's Motion Regarding Daycare Arrearage and Administrative Ruling. A party seeking review from the Court of Appeals:

> [a] party should arrange for the transcript of all those portions of the verbatim report of proceedings necessary to present the issues raised on review…If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding.

RAP 9.2(b) has been modified as of September 1, 2017, however the relevant portions set forth above have not been modified.) As the respondent, has been forced to obtain the additional portions of the record not provided to this Court by appellant the appellant should reimburse the respondent the cost incurred in procuring these additional portions of the record.[41] The importance of the unprovided transcript is made clear below.

The appellant argues that this Court should accept the administrative tribunals figures without questioning the fundamental principals of mathematics that have resulted in an egregious error in the manner of converting Canadian dollars to United States dollars. The administrative tribunal found that when converting Canadian dollars to United States dollars you multiply by between 1.25 and 1.30. CP 563. The administrative law judge thereby found that Canadian dollars are more valuable than United States dollars. CP 563. The appellant makes this request despite acknowledging the mathematical error before the superior court. Verbatim Transcript of Proceedings for December 9, 2017, pg. 28, ln. 13-18. However, the appellant conveniently failed to procure and provide the

[41] *Favors v. Matzke*. 53 Wash.App. 789, 794, 770 P.2d 686 (Ct. App. Wash. Div. 1, 1989).

transcript of this hearing despite it being foundational hearing for the order that has been placed before this Court on review.

The appellant's argument, and acknowledgement of the administrative tribunal's error in calculating the exchange rates between Canadian dollars and United States dollars invited the Kitsap County Superior Court to offset the amount paid by appellant for child care costs in manner that is now being assigned error on appeal. CP. 587. As the appellant's actions have induced the error that is now complained of on appeal, this Court should summarily deny the requested relief under the doctrine of invited error. The doctrine of invited error precludes an appellate court from review of errors induced at the trial court level by the actions of the appellant. The Supreme Court of the State of Washington has previously stated "[t]he doctrine of invited error precludes review when the appellant induces the trial court to take the action to which error is assigned on appeal."[42]

In the case at bar, the appellant acknowledged the administrative tribunal's error in converting Canadian dollars to United States dollars, provided the Kitsap County Superior Court with a calculation tabulating the correctly converted amount, and is now arguing that the Kitsap County

[42] *In re Dependency of K.R.,* 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

Superior Court committed error by correctly converting the amount of child care expenses paid by the appellant from Canadian dollars to United States dollars. CP 587. To allow the appellant to prevail after inviting an error, as described, undermines the core tenant of candor to a tribunal; candor to both to the superior court and to the court of appeals.

During oral argument before the Kitsap County Superior Court on December 9, 2016, and in written declaration filed with the superior court on December 1, 2016, the appellant acknowledges the administrative law judges error in calculating the conversion between Canadian dollars and United States dollars. CP 485-488, 582-594 and. Verbatim Transcript of Proceedings for December 9, 2017, pg. 28, ln. 13-18. At hearing the respondent stated:

> I think that there are probably are some parts, you know, clearly the math – my client acknowledges the math is kind of funky with what the ALJ. She admits that in her declaration as far as the conversion rates."

Verbatim Transcript of Proceedings for December 9, 2017, pg. 28, ln. 13-18. The appellant also utilized the proper conversion rates in her declaration filed with the Kitsap County Superior Court on December 1, 2016, and attached as Exhibit 4 conversion rate table. CP 582-594. The appellant is attempting to pull the wool of this Court's eyes by not honestly representing their prior positions taken before the Kitsap County Superior Court to this

Court and to take advantage of a windfall granted by the inaccurate mathematical calculation of the administrative law judge.

Furthermore, the appellant requests that this Court grant her equitable relief without any citation to legal authority allowing this court to grant the relief requested. RAP 10.3(a)(6) mandates that a party filing a brief with the Court of Appeals must support the issues raised for review with citations to legal authority and references to relevant parts of the record. This Court has interpreted this to prevent the review of conclusory arguments that are unsupported by citations to legal authority.[43] As the appellant has presented no legal authority for her claim to equitable relief, and the appellant invited the error via declaration and argument before the Kitsap County Superior Court which is now complained of on appeal, respondent asks this court to deny the appellant's request and awarded attorney fees for having to respond to this issue, as the request as put forth in the Appellant's Opening Brief does not comply with the Rules of Appellate Procedure governing this action.

IV. CONCLUSION

The appellant argues that the Final Order of the administrative tribunal should receive the protection of res judicata, thereby prohibiting the

[43] *Brownfield v. City of Yakima,* 178 Wash. App. 850, 876, 316 P.3d 520, 534 (Ct. App. Wash. Div. 3, 2014) *citing Joy v. Dep't of Labor & Indus.*, 170 Wash.App. 614, 629, 285 P.3d 187, 194–95 (Ct. App. Wash. Div. 2, 2012).

respondent from collaterally attacking the administrative tribunals final order by filing a motion before the Kitsap County Superior Court. In support of this argument the appellant cites to *In re Marriage of Aldrich*, 72 Wash.App. 132, and *Department of Social and Health Services v. Handy*, 62 Wash.App. 105. However, both *Aldrich* and *Handy* contemplated consecutive litigations, where the administrative tribunal made a final determination and then the aggrieved litigant in each respective case before initiating litigation before the superior court seeking relief. Neither *Aldrich* nor *Handy* contemplated concurrent litigation before the administrative tribunal and the superior court initiated by the same litigant. Res judicata is intended to prevent re-litigation of already determined actions, and to curtail multiplicity of actions.[44] Furthermore, the doctrine of res judicata applies to final orders of a tribunal, both judicial and quasi-judicial, except in special cases.[45]

In the case at bar, the appellant initiated concurrent litigations requesting substantially similar relief, and asserting substantially similar claims. CP 406-415. The appellant sought both tribunals to establish an arrearage of unpaid child care expenses incurred and actually paid by the appellant. The appellant's actions created a situation where the appellant

[44] *Loveridge c. Fred Meyer, Inc.*, 125 Wash.2d 759, 763 (1995).
[45] *Kelly-Hansen*, 87 Wash.App at 329.

was able to choose the more beneficial order. In the first situation, the appellant created a race to final order whereby the first tribunal to issue a final order would receive the protection of res judicata. In the second situation, the appellant is able to argue that the Kitsap County Superior Court's order should receive precedence over the administrative tribunal's order, if the superior court order is more beneficial to the appellant. The appellant's actions undermine the fundamental principal of res judicata to curtail concurrent litigation before multiple tribunals. Given the appellant's actions of offending the underlying principles of res judicata the administrative tribunal's final order should not receive the protections of res judicata this Court should deny the administrative tribunal's Final Order the protections of res judicata. Given the appellant's actions of initiating collateral litigation seeking substantially similar relief this court should hold that this is a special cases where res judicata does not apply.

The appellant also argues that the administrative tribunal was properly exercising jurisdiction under RCW 26.23.110 despite never raising this issue before the Kitsap County Superior Court. RAP 2.5(a) prohibits a litigant from raising issues for the first time on appeal unless one of three exceptions are met. The respondent does not argue than any exception is met. As the appellant has not provided any argument as to the applicability of any of the exceptions specifically identified in RAP 2.5, this court should

refuse to review Assignment of Error No. 4 as it was not raised before the superior court despite the appellant being on notice of its applicability.

If this court does find that the appellant may raise the issue identified in Assignment of Error No. 4 for the first time on appeal, the respondent selected his forum, the administrative forum, by not initiating an action in the Kitsap County Superior Court within 20 days from his receipt of the notice of the administrative action. However, after the respondent selected his forum the appellant initiated concurrent litigation before the Kitsap County Superior Court and now wishes to foreclose the applicability of the superior court's findings as they are financially detrimental to the appellant. CP 406-415.

The appellant also fails to identify that the administrative tribunals order is inconsistent with the Kitsap County Superior Court's order. When an administrative order conflicts with an order of the superior court, the superior court order controls to the extent of the conflict.[46] The order as entered by the Kitsap County Superior Court mandates that any child care expenses paid by the appellant be converted from Canadian dollars to United States dollars on the date that the service is incurred or payment is made. CP 485-486. The administrative order reduces the anticipated

[46] *Handy*, 62 Wash.App. at 111.

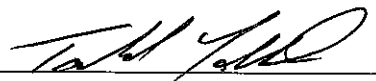
monthly expense into U.S. dollars at the date of the orders drafting, thereby contradicting the superior court's order. CP 565. The requirement that the child care expense be converted to United States dollars at the date the service is incurred or the date payment is made prevents the order from being reduced to a flat rate monthly payment due to the fluctuation of the exchange rate between Canadian dollars and United States dollars. CP

The appellant also requests that this court uphold the calculation of the administrative tribunal converting Canadian dollars to United States dollars, despite the appellant's prior admission to the Kitsap County Superior Court that calculation of the administrative tribunal is incorrect. Cp 582-594 and Verbatim Transcript of Proceedings for December 9, 2017, pg. 28, ln. 13-18. The appellant omits the relevant portions of the proceedings from the record on appeal in what appears to be an effort to diminish the impact of the appellant prior position. The appellant's candor before this tribunal is suspect given the action of attempting to pull the figurative wool over this court's eyes in an attempt to procure a windfall of a miscalculation of the administrative tribunal. The appellant also asks this court for equitable relief without actually identifying any legal authority entitling the appellant to this relief. The appellant's conclusory request for relief should be disposed by this Court in a similar fashion, without argument for failure to abide by Rap 10.3(a)(6). The equitable relief

requested by the appellant is the product of the appellant's prior admission of the error of the administrative tribunal, thereby the error was invited by the appellant. As the appellant invited the identified error the appellant's requested equitable relief should be denied.

The respondent requests that this court find that the Final Order of the administrative tribunal does not receive the protections of res judicata due to the appellant's action of initiating concurrent, collateral litigation seeking the same relief. The appellant's action offends the basic principles of res judicata and moves this case into the category of 'special cases' mentioned in *Kelly-Hansen* and the proceeding case law. As the administrative tribunal's Final Order does not receive the protection of res judicata, this court should hold that the respondent's collateral attack on the Final Order is proper and deny the appellants requested relief, and uphold the Kitsap County Superior Court's order of February 3, 2017.

RESPECTFULLY submitted this 8th day of September, 2017.



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